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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 367

OTIS MASON MARTIN, CLAIMANT,
Petitioner,

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

C. Carter Lee,
Rocky Mount, Virginia,
Attorney for Petitioner.

INDEX

	Page
Summary of Matter Involved	1
Opinion	4
Question Involved	4
Basis of Jurisdiction	4
Reasons Relied upon for Allowance of Writ	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 367

OTIS MASON MARTIN, CLAIMANT,
Petitioner (Appellant),

v.

UNITED STATES,
Respondent (Appellee)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Otis Mason Martin, Claimant and Appellant respectfully shows:

Summary of Matter Involved

This is an action at law, wherein the Government filed a libel against one Ford Coupe Automobile, Motor No. 18-5497068, owned by Appellant, praying forfeiture under Section 3321 and 3720, United States Code, in that said automobile was unlawfully used in the transportation and concealment of untaxed distilled spirits.

Appellant claims that the automobile was seized as the result of an unreasonable search and the search was violative of the Fourth Amendment of the Constitution of the United States, and in contravention of Rule 41 of Federal Rules of Criminal Procedure. A timely motion was made for the suppression of the evidence obtained by reason of said search for the reason that said seizure was made by an unreasonable entry and search of the garage of appellant, which garage was adjacent to and within the curtilage of appellant's home, and the said entry, search, and seizure having been made in the night time without a search warrant, without a warrant for arrest, and without permission of entry by appellant, or request for admission by the officer making the search; although Otis Mason Martin was present at the time and known to be the owner of the premises, and the automobile and contents, no arrest was made. The searching officer, however, did tell appellant to appear in Court on the following day to which appellant agreed. The search and seizure was not made as an incident to any valid arrest, since an arrest was not made.

Otis Mason Martin, was, on July 7, 1947, upon a plea of guilty, placed on probation for three years by the United States District Court for the Western District of Virginia, under the supervision of Probation Officer Willard N. Fansler, who made the search on January 20, 1950, at from 5:45 at 6:00 A. M. while it was night time, which resulted in the seizure of the automobile and contents thereof.

The dwelling of appellant was about one-half mile outside of the City of Roanoke, Virginia, upon a rectangular lot, the garage being about 60 feet back of and slightly to one side of the house, with the driveway extending from the roadway in front of the house and along side of same to the garage.

By agreement in open court, it was stipulated that the evidence before the trial court on the 27th day of February, 1950, upon the hearing of the revocation of the probation of Otis Mason Martin, as well as the motion to suppress the evidence should be considered as all the evidence in this case. Trial by jury was waived.

The motion to suppress the evidence was informally passed upon by the Trial Court on the 27th day of February, 1950, and was denied, to which appellant excepted, and thereafter filed his answer denying the right of forfeiture. The Trial Court had theretofore revoked the probation of appellant, and imposed a sentence upon Martin of two years confinement in prison and a fine of $250.00.

From the conclusions of law of the Court below (District) the court said:

> "I deem it unnecessary to give any consideration to, or state any conclusion of law as to, the legality of Officer Fansler's search and seizure, had Otis Martin not been on probation. Inasmuch as Otis Martin was on probation and Officer Fansler was specifically charged with his supervision, I conclude as a matter of law that, under the circumstances set out in my findings of fact, Officer Fansler, in the discharge of his duty of supervising Probationer Otis Martin, was not required to first obtain a search warrant before entering the premises of Otis Martin and searching his garage. I therefore conclude that the motion of claimant, Otis Martin, to suppress the evidence of Officer Fansler, must be overruled." (R. p. 4.)

Upon appeal from the District Court to the United States Circuit Court of Appeals, the Court said ". . . The amendment applied in this case to Martin, a probationer, and to his garage located near his home, although his status is a circumstance to be taken into consideration; . . ."

Appellant contends that if the search had been made in the instant case by any person other than a probation

officer, and/or that if the party searched had been other than a person on probation that the said search would have been held to be unreasonable, and the evidence suppressed, the contention of appellant being that neither the fact that the officer making the search was a probation officer, nor the fact that Martin was a probationer should contravene the constitutional rights of appellant in defense of the forfeiture or in defense of a new crime uncovered as the result of said search.

No question is raised as to the authority of the Trial Court to revoke the probation; and, admittedly, the automobile was subject to forfeiture if the evidence obtained as a result of the search is legal.

Upon appeal from the District Court to the Circuit Court of Appeals, the judgment of the District Court was affirmed on the 24th day of July, 1950, whereupon the appellant applied for a rehearing which was denied the 6th day of September, 1950.

Opinion

The finding of facts and conclusions of law of the Trial Court is set forth in R. p. 1. The opinion of the Circuit Court of Appeals is set forth in R. p. 30.

Question Involved

The question involved herein is whether the search and seizure made by the United States Probation Officer Fansler of the garage of appellant on the 20th day of January, 1950, at from 5:45 to 6:00 A. M. was reasonable or unreasonable under the circumstances.

Basis of Jurisdiction

This court has the authority to review the judgment of the United States Circuit Court of Appeals. The question involved is purely a federal one. An appeal from the judg-

ment of the United States District Court to the United States Court of Appeals was taken within the time prescribed and this application for a Writ of Certiorari is being made within the time limit.

Reasons Relied upon for Allowance of Writ

Appellant says that the specific question involved in the instant case as applied to the facts herein, has not heretofore been construed by the Courts. Hence the case at bar presents questions which are largely of first impressions, i. e., as to the authority of a Probation Officer to make a search and seizure within the building of a Probationer, without either a warrant of arrest or warrant for search and seizure; and which search and seizure was made in the night time and without the arrest of the owner of the property seized by reason of said search, who was present at the time, and known by the officer making the search to be the owner of the property so seized as a result of said search.

It would also appear that from the decision of the Court below (District) that consideration was given by the Court to the fact that the search was made by a Probation Officer and the premises searched belonged to a Probationer, and this fact was given material consideration to the prejudice of appellant; and that consideration was also given to this fact by the United States Circuit Court of Appeals to the prejudice of appellant, the court, holding in effect that by reason of the fact that the search was made by a probation officer upon the premises of a probationer was a circumstance justifying the search.

The question here is one of substance with respect to the construction of the Fourth Amendment of the Constitution of the United States and likewise involves the application of Rule 41 (c) of the Federal Rules of Criminal Procedure with respect to searches and seizures made in the night

time, and this application for Writ of Certiorari is made in accordance of Rule 33 of the Supreme Court Rules as amended. The question here involved, as applied to the facts herein, has not been, but should be settled by this Court.

Failure to settle this question will probably engender much disputation and lack of uniformity amongst enforcement officers with respect to the limitations and operation of future acts of enforcement officials with respect to searches and seizures; and raises the question as to whether a probation officer is empowered with superior authority over that of other enforcement officers, and whether the rights of a probationer are circumscribed under the provisions of the Fourth Amendment.

Definitive construction by the Supreme Court of the Fourth Amendment of the Constitution, as well as that of Section 41 (c) of Federal Rules of Criminal Procedure, as applied to the circumstances of the instant case would prove most helpful and promote certainty and uniformity in the future conduct of enforcement officials with respect to searches and seizures.

And petitioner says that the Court below, in the instant case, has decided a federal question in a way probably in conflict with applicable decisions of this Court, and/or has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals of the Fourth District, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in the case numbered and entitled on its docket as No. 6109, Otis Mason Martin, Appellant

v. United States, Appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals of the Fourth District be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated October 12, 1950.

OTIS MASON MARTIN,
By —— ——,
Counsel for Petitioner.

C. CARTER LEE,
Attorney for Petitioner,
Rocky Mount, Virginia.

INDEX TO SUPPORTING BRIEF

Subject Index:	Page
Opinions of Court Below	11
Argument	12

Table of Citations

Agnello v. *United States*, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145	17
Boyd v. *United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746	17
Go-Bart Importing Co. v. *United States*, 282 U. S. 344, 51 S. Ct. 153	17
Gouled v. *United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 319	17
Johnson v. *United States*, 33 U. S. 10, 68 S. Ct. 367	17
McDonald v. *United States*, 333 U. S. 451, 69 S. Ct. 191	17
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319	17
Taylor v. *United States*, 286 U. S. 1, 52 S. Ct. 466	17
United States v. *Rabinowitz*, 70 S. Ct. 430	13, 17
Weeks v. *United States*, 232 U. S. 383, 34 S. Ct. 341	17

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 367

OTIS MASON MARTIN, CLAIMANT,
Petitioner,

vs.

UNITED STATES,
Respondent

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

Opinions of Court Below

The conclusions of the facts and the law by the District Court are set forth in R. p. 1; and the opinion of the Circuit Court of Appeals is set forth in R. p. 30.

Although the opinion of the Circuit Court of Appeals held in effect that:

> "There is no doubt that the Fourth Amendment protects all persons suspected or known to be offenders as well as the innocent, and it unquestionably extends not only to the persons but also to the houses of the people, whether they be residences or places of business . . . The Amendment applies in this case to Martin, a probationer and to his garage located near his home,

although his status is a circumstance to be taken into consideration;" . . .

Following the above statement, the Court sets forth the circumstances to be taken into consideration as to Martin's status as a probationer, and the decision of the Court confirms the judgment of the District Court. It would appear from the conclusions of law of the District Court, as well as the opinion of the Circuit Court of Appeals confirming the judgment of the District Court that serious consideration was given to the fact that Martin was on probation, and evidently, the circumstance that the officer making the search was a probation officer, and appellant was on probation, was the determining circumstance in the judgment of the court below.

Argument

The officer making the search had no warrant either for arrest or for search. Martin was not arrested, although he was known to the Probation Officer as the owner of the property.

The entry of the garage was made in the night time at from 5:45 to 6:00 A. M. on January 20, 1950, and by the officer opening the door of the garage without permission or request for admission. And the search was not made as an incident of an arrest.

Appellant does not question the right of the District Court to revoke his probation. The officer making the search had ample grounds to take Martin before the Court for violating his probation before the date of the search and seizure.

The evidence which justifies the revocation of a probation is a thing apart from that which is required for his conviction in the first place. The evidence is likewise different from that to justify the forfeiture of his property.

It is not necessary that a probationer commit a crime to forfeit his right of probation. It may be forfeited for such

reasons as his failure to make stated reports, or failure to avoid his former associates, or for failure to follow some useful occupation. The constructive purpose of probation is to encourage the probationer to rehabilitate himself, and his failure to make such effort is all that is required to effect the revocation.

But the fact that a man is on probation does not abridge any of the rights secured to him by the Fourth Amendment of the Constitution, nor his right to avail himself of any defense provided by the Bill of Rights as to any new crime.

May the requirements for a second conviction be less than in the first instance? Can the property of a probationer or convicted prisoner be subject to forfeiture with less requirements than that of a free man?

It will be observed from the opinion of the court below that the case of *Rabinowitz* v. *United States,* 339 U. S. 56, 65-6 was largely relied upon in its finding in the instant case. However, there are several wide distinctions between that and the case at bar; for example:

(1) In the *Rabinowitz* case, the officers were armed with a valid warrant of arrest; in the instant case, there was no arrest; and

(2) In the *Rabinowitz* case, the officers went to respondent's place of business, during business hours, a one room office open to the public, and to which the public, including the officers, were invited; in the instant case, the officer opened the door of the garage in the night time and entered the garage without invitation or request for admission thereto; and

(3) In the *Rabinowitz* case, the officers had positive information of the violation; in the instant case, the officer only suspected the new violation; and

(4) In the *Rabinowitz* case, the officers arrested Rabinowitz, and made the search as an incident of the arrest;

although Martin was present and known by the officer to be the owner of the garage and the automobile therein, no arrest was made prior to or after the search.

The learned Judge in the instant case said:

> "It is true that he did not take the offender into physical custody, but he obtained his promise to report to the Court the next day and he seized the automobile and the fruits of the crime." . . .
>
> "It may be doubtful whether these circumstances, coupled with the compliance of the probationer with the officer's notice to appear in court constituted an arrest within the technical meaning of the term;" . . .

While the Court below in its opinion said, "The Fourth Amendment applies in this case to Martin, a Probationer and to his garage—. . ." (R. p. 33).

But notwithstanding this fact, the Court held in effect that Probation Officer Fansler had authority without a warrant of any kind, and without permission or request for admission, to enter the garage of Martin in the night time and make a search and seizure therein without even an arrest, although Martin was present and known to be the owner of the premises and the items seized.

It is difficult to imagine any state of circumstances wherein the search could have been held to be unreasonable if the search in the instant case should be held to be a reasonable one. On the other hand, it is submitted that the search in the instant case was wholly unreasonable.

Admittedly, the actual use of force is not necessary to constitute an arrest; but the intention to arrest must be there, and must be evidenced by some unequivocal act, as by keeping the arrested person in sight, or in some way controlling his actions, or by use of words indicative of arrest. There can be no arrest without some restraint. Can it be that the mere telling an offender or requesting him to appear in court is tantamount to an arrest? Can a legal

summons or subpoena be served by some officer telling the party to come to court at a particular time? In this case, there was no restraint, and no arrest. The officer left the offender at liberty to go his own way.

The Supreme Court, in its wisdom, and within its prerogatives, promulgated admirable Federal Rules of Criminal Procedure, among which is Rule 41. This Rule, paragraph (c), gives specific directives concerning the issuance of search warrants and the execution and return of same. It provides among other things, that:

> "The warrant shall direct that it be served in the day time, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it shall be served at any time."

May an officer in the face of this Rule, and without positive knowledge, and without even a warrant for arrest, have greater power with respect to a search and seizure than that of an officer with a regular search warrant absent the positive affidavits?

We recognize that there are two schools of thought with respect to searches or seizures as applied to the Fourth Amendment; one of which would limit such searches to officers armed with a valid search warrant, or in case of only a warrant for arrest, to the search of the person arrested and seizure of visible things within reach; while the other school of thought would not so limit such searches where officers were armed with valid warrants of arrest, but enlarge such searches and seizures to include things or papers within the room, including desks and files, making such searches and seizures an incident to a valid arrest.

Both of these schools of thought are supported by eminent jurists, and by reasons equally cogent. But none of these authorities have favored exploratory searches, whether with or without a search warrant; nor has either

school of thought gone so far as to approve a search without a warrant of any kind, unless it be for most compelling reasons, such as the imminent danger of loss of life or limb; or disturbances of the peace, and even in this emergency, the rule is to first demand admission before making an entry into a building.

As the basis for a search, without a search warrant, there must be a lawful arrest. The right to enter the precincts of the home or curtilage of another should be incidental only to a lawful arrest, and not for the purpose of securing evidence upon which to justify an arrest.

It is significant that Officer Fansler, in effect, admitted that he entered the garage in this case, primarily to see what was in the car on the occasion of the search in question. See R. p. 20, where the following questions and answers were given:

> "Q. You came there for the purpose of seeing what was in the car?
> A. Primarily, yes sir, and to talk to Mr. Martin.
> Q. You did not knock on the door?
> A. No, sir.
> Q. You had no invitation.
> A. No, sir, I did not."

It is contended that if the search in the instant case had been made by any person other than a probation officer that the Court would have suppressed the evidence; and if Martin had been other than a probationer, the search would have been held illegal. It is contended therefore that neither the fact that the official making the search was a probation officer, nor the fact that Martin was a probationer should contravene the constitutional rights of appellant. It was not for the purpose of revoking the probation to which appellant objects; but the use of such evidence in the forfeiture proceeding, and for the new offense to which the appellant may be subjected.

The following authorities are relied upon in support of petition for Writ of Certiorari:

Agnello v. *United States,* 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145; *Boyd* v. *United States,* 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 51 S. Ct. 153; *Gouled* v. *United States,* 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; *Johnson* v. *United States,* 333 U. S. 10, 68 S. Ct. 367; *McDonald* v. *United States,* 333 U. S. 451, 69 S. Ct. 191; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319; *Taylor* v. *United States,* 286 U. S. 1, 52 S. Ct. 466; *United States* v. *Rabinowitz,* 70 S. Ct. 430; *Weeks* v. *United States,* 232 U. S. 383, 34 S. Ct. 341.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari, and thereafter reviewing and reversing said decision.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	12

CITATIONS

Cases:

Brinegar v. *United States*, 338 U. S. 160 — 12

Carroll v. *United States*, 267 U. S. 132 — 12

Cradle v. *United States*, 178 F. 2d 962, certiorari denied, 339 U. S. 929 — 11

Marron v. *United States*, 275 U. S. 192 — 11

McDonald v. *United States*, 335 U. S. 451 — 8

Morton v. *United States*, 147 F. 2d 28, certiorari denied, 324 U. S. 875 — 10

Newyahr v. *United States*, 177 F. 2d 658, certiorari denied, 338 U. S. 936 — 11

United States v. *Rabinowitz*, 339 U. S. 56 — 6–7, 9, 10, 11

Statutes:

18 U. S. C. (Supp. III) 3653 — 2, 7

Internal Revenue Code:

§ 3321 — 2, 3

§ 3720 — 2, 3

Miscellaneous:

Restatement of Torts (1934):

Sec. 41 (2) — 10

Comments b and c — 10

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 367

OTIS MASON MARTIN, CLAIMANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 30–35) is reported at 183 F. 2d 436.

JURISDICTION

The judgment of the Court of Appeals was entered July 24, 1950 (R. 35), and a petition for rehearing (R. 37–47) was denied September 6, 1950 (R. 48). The petition for a writ of certiorari was filed October 17, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether evidence leading to the forfeiture of an automobile was obtained by an unreasonable seizure under the following circumstances: (1) The officer making the seizure was a probation officer charged with supervision of the petitioner and entitled to arrest him without a warrant; (2) upon the basis of matters seen and heard by him, the officer believed petitioner to be engaged in illicit liquor activities in his garage immediately before he entered; (3) the officer entered the garage while petitioner was present, without permission and without an arrest or a search warrant; (4) the officer observed illicit liquor in the car and on the floor of the garage; (5) the officer obtained petitioner's assent to appear in court the next morning; and (6) the officer seized the automobile and the illicit liquor.

STATUTE INVOLVED

The construction and application of §§ 3321 and 3720 of the Internal Revenue Code (26 U. S. C. 3321, 3720), under which the forfeiture was effected, are not in issue.

18 U. S. C. (Supp. III) 3653 provides in pertinent part as follows:

> At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant.

STATEMENT

This is an action under §§ 3321 and 3720 of the Internal Revenue Code (26 U. S. C. 3321, 3720) for the forfeiture of petitioner's 1940 Ford coupe on the ground that on January 20, 1950, it had been used with intent to defraud the United States, in the removal, deposit, and concealment of distilled spirits upon which the taxes had not been paid, and that it was in the place where such spirits were stored (R. 1–7).

In his petition for certiorari, petitioner concedes that the automobile was subject to forfeiture if the evidence on which it was forfeited was legally obtained. Petitioner moved to suppress all evidence obtained by a United States probation officer, Willard M. Fansler, at the time he seized the car and illicit liquor. Prior to hearing the forfeiture case, the court had had a hearing on revocation of petitioner's probation, had revoked probation, and imposed a sentence of two years and a fine of $250 (R. 17–18). The evidence on the probation hearing was included in the forfeiture case by stipulation (R. 18). The facts in connection with the seizure are as follows:

On July 7, 1947, petitioner had been placed on probation for three years by the District Court after pleading guilty to violation of the federal

liquor laws (R. 1, 30).[1] For more than one year, Fansler, the probation officer, charged with supervision of petitioner (R. 1–2), had had reason to believe that petitioner was engaging in illegal liquor transactions (R. 14, 15, 23–26).

On the night of January 19, 1950, at about 9:30, Fansler, who was then watching petitioner's activities regularly, saw petitioner's other car, a 1950 Ford, and Cauley's car parked at petitioner's premises, but he did not see petitioner's 1940 Ford coupe, and he "presumed [petitioner] had gone to haul a load of whiskey." Fansler returned at about 11:00 or 11:30 p. m. and concealed himself across the street from petitioner's house, where he remained until about 5:45 the next morning (R. 8). At that time petitioner drove up and Fansler, still concealed off petitioner's premises, saw petitioner and Cauley drive into the garage in the 1940 Ford coupe. It was heavily loaded.[2] Petitioner put out the car lights and he and Cauley used flashlights. Cauley then closed the garage door. Fansler, still off the premises, heard a thud which he believed to be caused by the trapdoor in the garage, which he had observed when he was in the garage on an earlier occasion

[1] This was petitioners' third conviction in the District Court for violation of the federal liquor laws, he having served a sentence of 30 months imposed in 1939 and a sentence of six months imposed in 1942 (R. 17, 31).

[2] The car was equipped with a heavy-load spring and was weighed down from a normal position 8 to 10 inches above the tires to a point "pretty well on the tires" (R. 9).

with petitioner. He also heard the springs on the automobile "screech, as though the weight were being taken off the car" and "heard some articles being slid across the floor." He then walked to the front door of the garage (R. 10–11).[3] However, upon reaching the garage door, and before opening it, he listened for two or three minutes and heard petitioner say that "somebody should have come and picked up the stuff," which Fansler "took it for granted" meant whiskey (R. 18). He also heard someone going up and down the steps in the trap (R. 18, 19). Thereupon, Fansler opened the door, without knocking, and, as he testified (R. 18–19):

> * * * rolled the one garage door back and turned my flashlight into the garage. [Petitioner] was sitting back in the rear compartment of this 1940 coupe. Cauley was going downstairs with a case of whisky. I turned my flashlight into the car and there were seven, or eight or nine cases of whisky in the car. There were two or three cases on the floor and the remainder of the 26 cases were in the trap. I called to Cauley and told him to come up out of the trap and we talked a few minutes and I told him we would load it all back on; that we would have to turn it in. So we loaded the full 26 cases of

[3] In going to the garage, Fansler proceeded along the edge of the lot and was not certain whether he was "at all times on [petitioner's] property or on the adjoining property" (R. 20).

> whisky back on the 1940 Ford coupe, and I asked them if they would appear the next morning and they said they would, and I proceeded on to Mr. Howland's with the car and reported the seizure.[4]

The only express statement of his purpose appears in the following cross-examination (R. 20):

> Q. You came there for the purpose of seeing what was in the car?
>
> A. Primarily, yes, sir, and to talk to Mr. Martin.

Upon the conclusion of the testimony the court denied the motion to suppress the evidence and entered judgment forfeiting the automobile (R. 5–7). The judgment was affirmed by the Court of Appeals for the Fourth Circuit (R. 35).

ARGUMENT

The Court of Appeals correctly held that this case is governed by *United States* v. *Rabinowitz*, 339 U. S. 56. In that case this Court reiterated the established rule that the reasonableness of a search and seizure depends upon all the facts and circumstances (p. 66). It held, contrary to the contention that a search warrant is indispensable when advance opportunity to obtain one is available, that such a warrant is not a *sine qua non* to the reasonableness of a search and seizure incident to arrest (p. 65). The right to search for

[4] Mr. Howland's official position does not appear in the record. The Court of Appeals states that the automobile was delivered to "the federal authorities" (R. 32).

and seize, at the place of arrest, the "things connected with the crime as its fruits or as the means by which it was committed" was held to be derived not only from the authority to search the person, "but also from the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest" (p. 61).

Petitioner attempts to distinguish the instant case from *United States* v. *Rabinowitz* on the ground that here no arrest took place. The distinction is sought to be established primarily on the ground that Fansler did not take and retain physical custody of petitioner but only required him to appear the next morning. This fact cannot properly be evaluated separately from the totality of the facts bearing upon the question whether an arrest was made, including the authority to arrest and the probability of intent to arrest. Fansler was a probation officer charged with supervision over petitioner and as such he was specifically authorized to arrest petitioner without a warrant (18 U. S. C. 3653). Fansler had had a long period of acquaintance with petitioner's repeated violations of liquor law, including the techniques of those violations. Petitioner had himself admitted to Fansler that he had hidden liquor in the same garage that Fansler was watching on the night of the arrest and seizure (R. 23). On the night of the seizure, before leaving his place of concealment across the road from petitioner's premises, he had seen peti-

tioner drive into the garage with Cauley, whom he suspected as a result of his prior observations was engaged in illicit liquor traffic with petitioner. He had seen that the car was on that occasion equipped with a heavy-load spring and that it was heavily loaded. The car lights were switched off in the garage and flashlights were substituted. After the closing of the garage door, Fansler heard a thud apparently caused by the opening of the trap door in the garage, the screech of the car springs, and the sound of heavy objects being dragged across the floor of the garage.

As stated, all of these circumstances were known to Fansler before he went to the garage door. We submit that they constituted, without more, probable cause for arresting petitioner. But there was more. After reaching the door,[5] and before opening it, Fansler heard petitioner say that somebody should have come and "picked up the stuff," which Fansler justifiably inferred meant whiskey. He also heard someone making trips up and down the steps in the trap. His observations at that point, if not before, were convincing that petitioner and Cauley were actually unloading illicit liquor in the garage and that they expected someone to come for it. He was

[5] It is not clear from the record whether Fansler walked on petitioner's lot or on the adjoining lot in going to the door of the garage (see R. 20). In any event, this traversing of the open ground was no such physical breaking in as was criticized in *McDonald* v. *United States*, 335 U. S. 451, 458, which is cited as supporting the petition (Pet. 17).

therefore justified in entering the garage to arrest petitioner for the felony which was then being committed and which, by the same token, constituted a violation of petitioner's probation.

In the light of these circumstances, we think it is clear that Fansler's entry into the garage was justified for the purpose of arresting petitioner. Petitioner argues, however, that this was not the purpose of the entry and he relies upon Fansler's answer to a question on cross-examination (R. 20) that he went to the garage "primarily" to see what was in the car "and to talk to" petitioner (Pet. 16). As we read this testimony in the context of the whole record, Fansler meant simply that he wished to confirm the fact he had already perceived through his senses, *i. e.*, that petitioner had brought in a load of liquor that night. The fact that he intended to see "what was in the car" does not invalidate what was otherwise a lawful arrest upon probable cause and a lawful seizure as an incident of the arrest. Cf. *United States* v. *Rabinowitz,* 339 U. S. at 60.

The fact that Fansler did not retain physical custody of petitioner after the events in the garage, upon which petitioner so heavily relies in attempting to distinguish this case from the rule of the *Rabinowitz* case, is unimportant. Petitioner was subject to Fansler's authority as a probation officer and he submitted to that authority by agreeing to appear the next morning. This constituted an arrest, even though there was

no actual taking or manual touching of petitioner's person.[6] Moreover, as the Court of Appeals pointed out (R. 34), any doubt as to whether there was an arrest "within the technical meaning of that term" would not impair the applicability of the rationale of the *Rabinowitz* decision. For, as the Court of Appeals stated, "it

[6] Section 41 (2) of the *Restatement of Torts* (1934) states:

> The custody is complete if the person against whom and in whose presence the authority is asserted, believes it to be valid or is in doubt as to its validity and *submits thereto.* [Italics supplied.]

Comment b. to this section states:

> *Submission to asserted legal authority.* It is not necessary that the person asserting an authority shall physically touch the other or take him under his physical control or that submission to the custody be procured by threats or be induced by fear of physical compulsion. * * *

Comment c. states:

> *Submission, how shown.* The submission necessary to convert the assertion of authority into a custody taken thereunder may be shown by words or conduct. Submission by words may be shown by any language which expresses the other's recognition of the validity of the authority and his willingness to submit to custody. Submission by conduct may be shown by any act or omission indicating the other's recognition that he is within the custody and power of the person asserting the authority although no physical force is exerted or threatened, or by doing or refraining from doing any act which such person commands him to do as a condition for his release from the custody taken under the asserted authority.

See also *Morton* v. *United States*, 147 F. 2d 28 (C. A. D. C.), certiorari denied, 324 U. S. 875.

can hardly be maintained that the search was unreasonable, solely because the officer exercised his discretion to notify the probationer to appear rather than detain him physically at the time of the seizure of the car" (R. 34).

No other grounds for distinguishing the *Rabinowitz* case appear. We find no valid basis of distinction in the fact that in the *Rabinowitz* case a warrant of arrest had been obtained, whereas here the officer acted pursuant to specific statutory authority to arrest without a warrant, upon the basis of what he had seen and heard. See *United States* v. *Rabinowitz,* 339 U. S. 56, at 60; *Marron* v. *United States,* 275 U. S. 192, 198–199; *Cradle* v. *United States,* 178 F. 2d 962 (C. A. D. C.), certiorari denied, 339 U. S. 929; *Newyahr* v. *United States,* 177 F. 2d 658 (C. A. D. C.), certiorari denied, 338 U. S. 936.

In several aspects the legality of the seizure is even clearer in this case than in the *Rabinowitz* case. Here, there was no "search" in the ordinary sense of the word. All that occurred was the seizure of the visible instruments and fruits of the crime at the scene of the arrest. This has been distinguished from a searching out of evidence by hunting through a person's premises. See dissenting opinion, *United States* v. *Rabinowitz,* 339 U. S. 36, at 75. Moreover, the principal article seized, and which was the object of forfeiture, was an automobile which could be

quickly moved out of the locality or jurisdiction in which the warrant must be sought. *Carroll* v. *United States,* 267 U. S. 132, 153; *Brinegar* v. *United States,* 338 U. S. 160.

CONCLUSION

The decision below is correct and involves no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950